No. 04-207

In The Supreme Court of the United States

BETH LEWIS,

Petitioner,

-v-

STATE OF OHIO,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF IN OPPOSITION

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LIST OF PARTIES

The Petitioner is attorney Beth Lewis, now known as Beth Trimmer. She was called to testify at a grand jury investigation in Montgomery County, Ohio into the disappearance of a child and was held in contempt of court for refusing to obey the court's direct order to answer certain questions put to her at a grand jury proceeding.

The Respondent is the State of Ohio.

John Doe is the person believed to be responsible for the disappearance of the child. Petitioner is mistaken in asserting that John Doe has been indicted; he has not. His identity is unknown.

TABLE OF CONTENTS

	Page
LIST OF PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
JURISDICTION	1
STATUTE INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
CONCLUSION	7
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES:

Banker's Life and Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 6

Chambers v. Mississippi, 410 U.S. 284 (1973) 6

Green v. Georgia, 442 U.S. 95 (1979) 6

Illinois v. Gates, 462 U.S. 213 (1983) 6

State ex rel. Kay v. Cleveland, 271 N.E.2d 784, 27 Ohio St.2d 37 (1971) 5

State ex rel. Yates v. Abbott Laboratories, 766 N.E.2d 956, 95 Ohio St.3d 142 (2002) 4

State v. Issa, 752 N.E.2d 904, 93 Ohio St.3d 49 (2001) 5

State v. Williams, 51 Ohio St.2d 112, 364 N.E.2d 1364 (1977) 4

Swidler & Berlin v. United States, 524 U.S. 399 (1998) 7

Whitmore v. Arkansas, 495 U.S. 149 (1990) 6

Yee v. Escondido, 503 U.S. 519 (1992) 6

STATUTORY SECTIONS:

Ohio Rev. Code. § 2317.02 ..... 1, 2

OTHER:

28 U.S.C. § 1257 ..... 1, 5

JURISDICTION

Petitioner first raised federal questions she has presented to this Court when she asked the Supreme Court of Ohio to reconsider its decision on the merits against her. The Ohio Supreme Court summarily denied the motion. Respondent, the State of Ohio, suggests that her failure to ask any state court to consider the federal questions she has presented to this court deprives this Court of jurisdiction under 28 U.S.C. § 1257.

STATUTE INVOLVED

Ohio Rev. Code § 2317.02:

The following persons shall not testify in certain respects:

(A) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client and except that, if the client voluntarily testifies or is deemed by § 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

STATEMENT OF THE CASE

Erica Baker is a nine-year-old girl who disappeared on a walk with her dog in her grandmother's neighborhood in Kettering, Ohio, on February 7, 1999. It is believed by police and prosecutors that an area woman, Jan Franks,

had information about what happened to Erica Baker that day. Jan Franks died in Dayton, Ohio on December 30, 2001. Beth Lewis, whose name is now Beth Trimmer, is an attorney who was a federal public defender and once represented Jan Franks in a criminal case in federal district court in Dayton.

Jan Franks was married to Shane Franks when she died. Ohio's attorney-client privilege is codified in Ohio Rev. Code § 2317.02, and it provides that the privilege can be waived by the express or implied consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the client's estate. On April 4, 2002, Shane Franks, Jan Franks' widower, signed an affidavit and a waiver of his wife's attorney-client privilege. Beth Lewis was then subpoenaed to testify before the grand jury investigating Erica Baker's disappearance. She appeared, was sworn in, but refused to answer any questions about the matter under investigation, citing: 1) the attorney-client privilege; and 2) the Code of Professional Responsibility.

Following the procedure set out in Ohio law, the judge supervising the grand jury reviewed the questions and Petitioner's reasons for refusing to answer them, and he ordered Ms. Lewis to answer. Ohio Rev. Code § 2939.14. She refused to do so. The judge set a hearing for the following day and invited her to submit evidence and argument as to why she should not be held in contempt of court for refusing to answer the questions of the grand jury. Ohio Rev. Code § 2939.15. At that hearing, Ms. Lewis produced no evidence but argued that under the Ohio privilege statute, she, the attorney, had the power to choose whether to honor the surviving spouse's waiver of the privilege and if she decided not to testify, the court

lacked any authority to compel her to do so or to hold her in contempt if she did not. The heart of her argument was what "shall" and "may" meant in the context of Ohio Rev. Code § 2705.02. (Petitioner made a fleeting reference to the constitution but none of her arguments was based on federal law.) At the end of the hearing, the trial judge found Ms. Lewis to be in contempt of court. He gave her the opportunity to avoid punishment by answering the grand jury's questions by noon the next day. She announced her decision not to obey the court's order and the court refused to stay execution of the jail sentence.

Petitioner immediately appealed and obtained a stay of the jail sentence from the Ohio Court of Appeals for the Second Judicial District. On appeal, she reiterated and expanded the policy and statutory construction arguments she had made in the trial court. (See Appendix A, Petitioner's Assignment of Error and Issues Presented for Review in the Ohio Court of Appeals). She never raised the questions she has presented to this Court. On September 19, 2002, the Court of Appeals affirmed the finding of contempt.

Petitioner then appealed to the Supreme Court of Ohio. Once again, she confined her arguments to Ohio law. (See Appendix B, Petitioner's Propositions of Law in the Supreme Court of Ohio). The Supreme Court of Ohio issued a decision on the merits affirming the lower courts on March 3, 2004.

After the Supreme Court of Ohio issued its decision, Petitioner asked for reconsideration, raising then for the first time the federal questions that she would now have this Court decide. The Supreme Court of Ohio refused to reconsider its opinion. Petitioner immediately filed a

notice of removal of the action to federal court, to which the State objected for three reasons: 1) that there is no case left to remove because all of the issues have been settled; 2) that the notice of removal is untimely, coming as it did after the conclusion of the case; and, 3) that petitioner is precluded from re-litigating in federal court the issues that were or could have been settled in state court. That action is pending. Petitioner also asked this Court to issue a writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioner has not offered this Court a compelling reason to grant the writ. Her Petition fails for at least three reasons.

A. First, no Ohio court reviewing this case has ever passed upon the questions that Petitioner has presented to this Court, in which she invokes the protections of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The reason that no Ohio court has reached those questions is that Petitioner never raised them until after the Supreme Court of Ohio had decided the case on the merits, by which time they were considered waived. Rule XI of the Ohio Supreme Court Rules of Practice allows a litigant to ask the Supreme Court of Ohio to reconsider a decision on the merits before the decision becomes final, but it is an established, long-standing rule in Ohio that the Supreme Court of Ohio will not address a question, even a federal constitutional question, unless the question was presented and urged in the court below. *State v. Williams*, 51 Ohio St.2d 112, 117, 364 N.E.2d 1364, 1367 (1977); *State ex rel Yates v. Abbott*

Laboratories, 766 N.E.2d 956, 963, 95 Ohio St.3d 142, 148 (2002); *State v. Issa*, 752 N.E.2d 904, 920, 93 Ohio St.3d 49, 62 (2001); *State ex rel. Kay v. Cleveland*, 271 N.E.2d 784, 785-786, 27 Ohio St.2d 37, 38 (1971). Petitioner's attempt to present new, federal questions dressed as a motion for reconsideration to the Supreme Court of Ohio was doomed by her failure to raise those federal questions in the trial court, the court of appeals, or in the brief on the merits in the Supreme Court of Ohio.

From the beginning of this case until after the Supreme Court of Ohio issued its opinion, Petitioner has defended her refusal to answer the grand jury's questions by arguing that the waiver provision of Ohio's attorney-client privilege statute gave her, the attorney, the choice to testify or not. According to her, a valid waiver of the privilege is merely a condition precedent to a lawyer's choosing whether to testify when called to do so. Her argument has always been that the courts had misread the Ohio statute, an argument she supported by emphasizing certain policy considerations. She also argued, without any real basis, that the waiver applied only in testamentary matters. She did not argue that she, her client, or anyone else stood to suffer violations of their rights under the United States Constitution if she obeys the court's order to return to the grand jury and answer its questions. This is hardly the forum to debate those questions for the first time.

Whether Petitioner's failure to raise the claims below deprives this Court of all power to review them under the certiorari jurisdiction granted under 28 U.S.C. § 1257, or whether the "not pressed or passed upon below" rule is merely a prudential restriction that does not pose an insuperable bar to review, the writ should be denied.

Although Petitioner insists that the questions are of great import, she failed to raise them in a forum where they could have been debated and decided. Because the questions have not been raised or decided by any state court, the record is entirely lacking in evidence or argument that might support her claims. There is no reason for this Court to take this case to decide federal questions that Petitioner did not raise in any Ohio court. *Yee v. Escondido*, 503 U.S. 519, 533 (1992); *Banker's Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988); *Illinois v. Gates*, 462 U.S. 213, 217-225 (1983).

B. The issues presented by Petitioner to this Court for review are entirely theoretical. No one's Fifth, Sixth, or Fourteenth Amendment rights have been violated in this case, nor will constitutional violations ensue if the Court does not do as Petitioner wishes. Petitioner's client is dead (as are all clients whose attorney-client privilege can be waived by a surviving spouse) and the client cannot claim the protections afforded by the Fifth, Sixth, or Fourteenth Amendments to the United States Constitution. Furthermore, if there could exist a set of facts under which a living person risked having his or her constitutional rights violated by imposition of Ohio's provision for post-mortem waiver of the attorney-client privilege, then that person would have standing to argue that Ohio's statute could not be enforced if doing so violated his rights. Cf. *Green v. Georgia*, 442 U.S. 95 (1979); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Because neither petitioner's constitutional rights, her client's constitutional rights, nor any other person's constitutional rights have been violated or are at risk of being violated by Ohio's attorney-client privilege post-mortem waiver provision, there is no actual case or controversy here and the writ should be denied for that reason. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

C. The issues Petitioner presents involve an unusual feature of Ohio's attorney-client privilege. This provision, which allows the surviving spouse of a deceased client to waive the attorney-client privilege on the client's behalf, has rarely been used in Ohio, and never, as far as counsel can ascertain, in a criminal matter. Additionally, no other state's version of the attorney-client privilege appears to permit the surviving spouse of a deceased client to waive the privilege for any purpose as Ohio's does. The questions presented, even if properly before the Court, are not being debated in the states, and are unrelated to those cases in which there is no provision for post-mortem waiver of the privilege. Cf. *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). Because the questions presented affect only one rarely-used statute in one state, it is not an issue that bears review by this court.

CONCLUSION

For these reasons, the writ should be denied.

Respectfully submitted,

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APPENDIX A

PETITIONER'S ASSIGNMENT OF ERROR AND ISSUES PRESENTED FOR REVIEW IN THE OHIO COURT OF APPEALS

State of Ohio v. John Doe, Court of Appeals for Montgomery County, Case No. 19408.

THE TRIAL COURT ERRED, AS A MATTER OF LAW, WHEN IT ORDERED ATTORNEY LEWIS TO DISCLOSE CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS AND WHEN IT HELD HER IN CONTEMPT OF COURT FOR PROTECTING THESE COMMUNICATIONS. (*Decision*, T.d. 7).

ISSUES PRESENTED FOR REVIEW

Based on Appellant Grand Jury Witness' assignment of error, the following issues are presented for review on appeal and will be discussed more fully in this brief:

A. Under R.C. 2317.02(A), An Attorney May Not Be Found In Contempt Of Court For Refusing To Answer Questions She Believes To Be Privileged Attorney-Client Communications Absent A Prior Finding By The Court That The Client Has Voluntarily Testified Or Waived The Attorney-Client Privilege.

B. Even With The Consent Of A Client's Surviving Spouse Under R.C. 2317.02(A), An Attorney Is Not Required To Testify Regarding Confidential Communications With Her Client When Such Testimony Is Sought In Non-Probate Proceedings Or Is Contrary To Or Inconsistent With The Interest Or Intentions Of The Client.

C. Under R.C. 2317.02(A), When A Surviving Spouse Consents To The Disclosure Of Confidential Attorney-Client Communications Between His Now-Deceased Spouse And Her Attorney, The Attorney Is Permitted, But Is Not Required, To Testify.

D. Absent A Waiver From The Client, The Compelled Disclosure Of Confidential Attorney-Client Communications Violates The Public Policy Of The State.

E. A Court May Not Compel An Attorney To Testify Under R.C. 2317.02(A) Regarding Confidential Attorney-Client Communications Where The Attorney Is Given Insufficient Opportunity To Present Evidence As To Why Such Testimony Is Inconsistent With The Client's Interests And Intent.

APPENDIX B

PETITIONER'S PROPOSITIONS OF LAW IN THE SUPREME COURT OF OHIO

State of Ohio v. John Doe, Supreme Court of Ohio, Case No. 2002-1666

PROPOSITION OF LAW NO. I:

The judiciary is a separate and distinct branch of the government, and the administration of justice by the judiciary, including all matters relating to the practice of law, cannot be impeded by the legislature in the exercise of their respective powers.

PROPOSITION OF LAW NO. II:

Absent a waiver or consent from the client, the compelled disclosure of confidential attorney-client communications violates the public policy of Ohio.

PROPOSITION OF LAW NO. III:

Under R.C. 2317.02(A), an attorney may not be found in contempt of court for refusing to answer questions regarding privileged attorney-client communications absent a prior finding by the court that *the client* has voluntarily testified or waived the attorney-client privilege.

PROPOSITION OF LAW NO. IV:

Even with the consent of a client's surviving spouse under R.C. 2371.02(A), an attorney is not required to testify regarding confidential client communications when such testimony is sought in non-probate proceedings or is contrary to the client's interests or intentions.

PROPOSITION OF LAW NO. V:

Under R.C. 2317.02(A), when a surviving spouse consents to the disclosure of confidential attorney-client communications between his now-deceased spouse and her attorney, the attorney is permitted, but is not required, to testify.

PROPOSITION OF LAW NO. VI:

A court may not compel an attorney to testify under R.C. 2317.02(A) regarding confidential attorney-client communications where the attorney is given insufficient opportunity to present evidence as to why testimony is inconsistent with the client's interests and intent.
